2-2500-8575-2

G002/M-93

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Petition by
Northern States Power Company to
Recover the Acquisition Premium
Associated With Its Purchase of the
Viking Gas Transmission Company

RECOMMENDED ORDER ON MOTIONS
TO DISMISS FOR FAILURE
TO STATE CLAIM

By written motion dated March 24, 1994, the Minnesota Department of Pub Service (Department) moved the Administrative Law Judge for an Order granti summary disposition of the Petition of Northern States Power Company pursua to Rule 56.03 of the Minnesota Rules of Civil Procedure. In the alternative the Department also moved for dismissal pursuant to Rule 12.02 of the Minnes Rules of Civil Procedure for lack of subject matter jurisdiction in the Commission and for failure to state a claim for which relief can be granted The Office of the Attorney General, by written Motion dated March 24, 1994, also moved the Administrative Law Judge for an Order dismissing the Petitio Northern States Power Company for failure to state a claim under Rule 12.02 of the Minnesota Rules of Civil Procedure. Both motions assert that the recognition of an acquisition premium for the Viking pipeline purchase is within the sole jurisdiction of the Federal Energy Regulatory Commission (FERC), and that Minnesota law does not allow recovery of an acquisition premium for nonjurisdictional property not subject to regulation by the Minnesota Public Utilities Commission. Northern States Power Company respo to the Motions on April 9, 1994, by filing a Memorandum and a separate Appendix. Both the Office of the Attorney General and the Department of Pub Service filed Reply Briefs in response to the NSP Memorandum.

The record on the Motion closed on April 20, 1994, with the receipt by Administrative Law Judge of the final post-hearing memorandum.

Appearances: David Lawrence and James Johnson, Attorneys at Law, North States Power Company, 414 Nicollet Mall, Minneapolis, Minnesota 55401, and Samuel L. Hanson, Briggs & Morgan, Attorneys at Law, 2400 IDS Center, 80 Sou Eighth Street, Minneapolis, Minnesota 55402, appeared on behalf of Northern States Power Company (NSP, Petitioner or the Company); Julia Anderson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Department of Public Service (DPS Department); and Gary Cunningham, Assistant Attorney General, 1200 NCL Tower 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Office of the Attorney General (Attorney General or OAG).

Having considered the Motions, the written submissions of counsel, and on the files and records herein, the Administrative Law Judge makes the follow

ORDER

1. The Motions of the Office of the Attorney General and the Departme of Public Services are both properly considered as Motions to dismiss for failure to state a claim under Rule 12.02 of the Minnesota Rules of Civil Procedure.

2. The Motions of the Department of Public Service and the Attorney General to dismiss for failure to state a claim are properly GRANTED. Any recovery of an acquisition premium for the Viking pipeline purchase by North States Power Company must be recovered, if at all, in a general ratemaking proceeding.

3. Pursuant to Minn. Rules, pt. 1400.7600 (1991), this Order is certified to the Minnesota Public Utilities Commission.

Dated this 7th day of June, 1994.

s/ Bruce D. Campbell
BRUCE D. CAMPBELL
Administrative Law Judge

MEMORANDUM

Introduction

The Department has styled its Motion as one for Summary Disposition und Rule 56.03 of the Minnesota Rules of Civil Procedure. In the alternative, i states that a dismissal is appropriate pursuant to Rule 12.02 of the Minneso Rules of Civil Procedure for failure to state a claim for which relief can b granted in this proceeding. The Office of the Attorney General describes it Motion as one for dismissal under Rule 12.02(a) of the Minnesota Rules of Ci Procedure. Both of the Motions assert that the Minnesota Public Utilities Commission has no jurisdiction to recognize an acquisition premium for the Viking Gas Transmission Company purchase. Sole jurisdiction to recognize su an acquisition premium, it is contended, rests with the Federal Energy Regulatory Agency (FERC). Any relief NSP seeks, both the Department and the Office of the Attorney General argue, must be obtained through an applicatio to the FERC. Beyond arguing federal preemption, the Department and the Offi

of the Attorney General also contend that Minnesota law prohibits the Commission from recognizing in Minnesota rates an acquisition premium for nonjurisdictional property. Since the Viking Gas Transmission Company is an interstate gas pipeline regulated by the FERC, the Attorney General and the Department contend that the acquisition premium is not "used and useful" in furnishing utility service to Minnesota ratepayers within the meaning of Minn. Stat. § 216B.16, subd. 6 (1992). Finally, both the

Department and the Office of the Attorney General argue that if Minnesota la
would allow including the Viking acquisition premium in Minnesota rates, suc
recovery could only be authorized in a general rate proceeding under Minn.
Stat. § 216B.16, subd. 6 (1992). The Department and the Office of the Attor
General assert that the Purchased Gas Adjustment mechanism authorized by Min
Stat. § 216B.16, subd. 7 (1992), may not be used to automatically pass the
acquisition premium on to Minnesota ratepayers.

NSP disputes each argument of the Office of the Attorney General and th
Department of Public Service. While the Company recognizes the general lega
principle of federal preemption regarding wholesale gas rates, it argues tha
FERC preemption does not apply to this case. The Petitioner also contends t
the "used and useful" legal standard has no application, since it is not
seeking to include the acquisition premium in its Minnesota rate base. NSP
seeks, instead, to amortize the premium on an annual basis and to offset tha
amortization against the savings in gas costs realized by Minnesota ratepaye
from the discount the Company has negotiated with Northern Natural Gas Compa
a prime NSP gas supplier. The Company argues that the acquisition of Viking
Transmission Company by NSP directly resulted in the cost savings it was abl
to negotiate with Northern. Finally, the Company contends that since saving
in gas costs are being enjoyed by NSP's Minnesota retail customers through t
PGA mechanism, it is appropriate to use that same device to recognize the
acquisition premium. NSP argues in the alternative that if the Commission's
PGA rules do not allow use of the PGA device, the Commission should grant a
waiver and amortize the acquisition premium over the period suggested by NSP
without requiring a general rate proceeding.

For the reasons hereinafter discussed, the Administrative Law Judge
concludes that the Commission could recognize an acquisition premium adjustm
associated with the purchase of the Viking Gas Transmission Company without
concern for federal preemption by the FERC. The Administrative Law Judge
interprets Minn. Stat. § 216B.16, subd. 6 (1992), as not limiting the
amortization of an expense which results in a direct benefit to jurisdiction
ratepayers to the "used and useful" standard. The Administrative Law Judge
believes that, in fairness, if the Company can establish that it would not h
purchased the Viking Transmission Company but for the benefits it anticipate
receiving for Minnesota ratepayers and that the purchase has resulted direct
in cost savings to Minnesota ratepayers which exceed the amount of the clai
amortization, a reasonable portion of the acquisition premium should be
amortized to expenses annually and recovered from Minnesota ratepayers. The
Administrative Law Judge, however, believes that both the language of Minn.
Stat. § 216B.16, subd. 7 (1992), and the Commission's PGA rules prohibit the
automatic recovery of a prorata portion of the acquisition premium through u
of the PGA mechanism. If Northern States Power Company could substantiate
its purchase of a nonjurisdictional asset has resulted in quantifiable and
direct benefits to Minnesota ratepayers in causing lower jurisdictional rate
it would be appropriate to include in test year expenses in the next general

ratemaking proceeding some allocated portion of the acquisition premium. Th
Administrative Law Judge does not believe, however, that it was ever intende
that such a single, isolated "cost" be recovered apart from a general
ratemaking proceeding, where rate base, return on equity, revenues and exper
are all considered to determine rates that are fair and reasonable.

Legal Standard -- Motion to Dismiss

Dismissal for failure to state a claim for which relief can be granted appropriate when it is apparent from the face of the complaint that the requested legal remedy is not available. See, e.g., Pederson v. American Luthern Church, 404 N.W.2d 887 (Minn. App. 1987). As correctly recognized b all of the parties, under the motions to dismiss for failure to state a clai the Administrative Law Judge must accept the truth of all facts asserted by Northern States Power Company. Schommer v. Flower City Ornamental Iron Worl 129 Minn. 244, 152 N.W.2d 535 (1915); City of Minneapolis v. Minneapolis Lt Ry. Co., 238 Minn. 218, 56 N.W.2d 564 (1952). All interpretations of the fa presented must also be interpreted in the light most favorable to NSP. Stephenson v. Plastic Corp. of America, 276 Minn. 400, 150 N.W.2d 668 (1967)

For purposes of these Motions, the Administrative Law Judge assumes the truth of the following facts: (1) Viking Transmission Company, which has be purchased by Northern States Power Company, was reasonably purchased at an appropriate acquisition premium necessary to consummate the transaction; (2) the purchase of the Viking Transmission Company by Northern States Power Company did not result in savings or efficiencies at the wholesale gas level within the jurisdiction of FERC; (3) the purchase of Viking Transmission Company resulted in direct and measurable benefits to Minnesota retail ratepayers in that a perceived threat of bypass existing after the purchase which resulted in Northern Natural Gas Company, a major NSP gas supplier, negotiating lower rates with the Petitioner; and (4) the lower rates charged Northern Natural Gas to NSP are currently being flowed through to Minnesota ratepayers by use of the PGA mechanism. The Administrative Law Judge does n conclude that the affidavits supplied by NSP affirmatively establish these assumed facts. If it were not appropriate to dismiss the Petition and if th matter went to hearing, either in a PGA context or in a general ratemaking proceeding, NSP may or may not be able to establish the truth of any or all the assumed facts. Under the legal standard applicable to a motion to dismi however, it is appropriate to afford the nonmoving party the benefit of the truth of all well-pleaded facts, as previously discussed.

Federal Preemption

Both the Office of the Attorney General and the Department of Public Service argue that since Viking is an interstate pipeline over which the FER has exclusive jurisdiction, federal law prohibits the Commission from, in effect, varying the FERC-approved Viking interstate rate for NSP's retail customers. The Department relies upon general authority for the proposition that:

FERC has exclusive federal authority to regulate interstate wholesale utility rates; state commissions have no regulatory power over wholesale interstate transactions. Northern States Power Co. v. Minn. PUC, 344 N.W.2d 374, 377-78 (Minn. 1984) (citing Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927)). See also, Mississippi Power and Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 108 S. Ct. 2428, 2439 (1988), 93 PUR 4th 293, 300.

Department of Public Service's Motion for Summary Judgment, p. 4. The Offic of the Attorney General also relies on the "filed rate" doctrine to limit th authority of the Commission.

It is hornbook law that, with respect to a federally-set wholesale gas rate, a state commission may not examine the reasonableness of that rate and disallow a portion of a federally-approved wholesale rate in a state ratemak proceeding. In Senior Citizens Coalition v. Minnesota Public Utilities Commission, 355 N.W.2d 295, 299 (Minn. 1984), the Minnesota court recognized that "FERC has plenary jurisdiction over regulating wholesale interstate transactions, while state utilities commissions retain authority regulate intrastate retail rates", relying upon Public Utilities Commission Rhode Island v. Attleboro Steam & Electric Co., supra, and Northern States Power Co. v. Minnesota Public Utilities Commission, supra. That general proposition of law, however, is the beginning and not the end o the inquiry.

In Southwest Gas Corporation, 127 PUR 4th 21 (Nev. PSC 1991), the Nevad Public Service Commission recognized that the "filed rate doctrine" containe in Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 74 PUR 4th 464 (1986), does not prohibit a state commission, for example, from determining whether the utility could have purchased gas supplies from other sources mor cheaply and adjusting the rate lower for lack of prudent purchasing by the utility. See, Kentucky-West Virginia Gas Co. v. Pennsylvania Public Utilit Commission, 650 F. Supp. 699 (Md. Pa. 1986), aff'd, 837 F.2d 600 (3rd Cir. 1988); In re Columbia Gas of West Virginia, Inc., 47 PUR 4th 392 (W. Va. PSC 1982).

The federal cases that establish the FERC filed rate doctrine also recognize the continuing ability of a state commission to set retail rates a long as the FERC wholesale rate is not frustrated. In Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986), the court recognized that there could be a divergence between wholesale costs and retail rates based on cost savings. Other Supreme Court and lower federal court decisions, cited in Montana-Dakota Utilities Company, 130 PUR 4th 76, 85-86 (Wyo. PSC 1992), delinate the continuing authority of state commission in setting local gas rates.

The same federal preemption argument was presented to the North Dakota Public Service Commission by its staff in the Viking Gas Transmission Compan acquisition premium case filed by NSP in that state. Northern States Power Company, Natural Gas, Rates, Case No. PU-400-93-534 (1994). The staff specifically argued to the Commission:

> . . . [I]t is obvious that the FERC is the appropriate agency with jurisdiction to determine the reasonableness of the Viking

> acquisition adjustment, and that if the purchaser is able to establish the claimed benefits, the FERC is empowered to include the premium in rates. . . .
>
> The appropriate agency with jurisdiction and authority to deal with this issue is the FERC. NSP's request should be denied.

Statement of Public Service Commission Staff, February 10, 1994, pp. 4, 7. its decision filed March 23, 1994, the North Dakota Commission recognized

NSP's right to recovery in retail rates without commenting on federal preemption. See, Northern States Power Company's Appendix, tab 1. Similarl in Application of Northern States Power Company (Wisconsin) for Authority to Increase Rates for Retail Gas Service in Wisconsin, 4220-UR-107, December 23 1993, the Wisconsin Public Service Commission authorized the recovery of the Viking acquisition premium in retail rates over expressed concerns of preemption.

The Administrative Law Judge agrees with NSP that it is recognizing in retail gas rates the FERC-authorized Viking wholesale transportation rate pa to Viking for the transportation services NSP receives at wholesale from Viking. Similarly, NSP is recognizing in retail gas rates the FERC-authoriz wholesale transportation rates NSP pays Northern for the transportation services NSP receives at wholesale from Northern. NSP's seeks to recognize acquisition cost as a retail cost, not a wholesale cost because it is the co incurred to obtain the savings that flow from the Northern discount to retai ratepayers of NSP. No such savings flow to NSP as the wholesale customer of Viking because NSP does not receive the discounted services from Viking. FERC's exclusive jurisdiction thus is not impacted. NSP does not seek to al or vary the FERC wholesale rate. That such substantial savings at the retai level could be reflected in jurisdictional rates by a state commission at th retail level has been specifically recognized by the federal courts in apply the filed rate doctrine. See, Montana-Dakota Utilities Company, 130 PUR 4th 76, 86 (Wyo. PSC 1992).

Since for purposes of the Motion, the Administrative Law Judge must ass that the benefits of the acquisition for ratepayers will be experienced at t retail and not the wholesale level, for NSP to seek an acquisition adjustmen for the Viking purchase from FERC would also be unavailing. Minnesota Power Light Company and Northern States Power Company (Minnesota), 43 FERC 61,104 61,342 (1988). The response of the Office of the Attorney General and the Department is that, in that event, NSP may obtain no remedy. For the reason previously discussed, the Administrative Law Judge finds that the filed rate doctrine and the exclusive jurisdiction of FERC over wholesale gas rates do prevent NSP from seeking a remedy from the Minnesota Public Utilities Commission which has jurisdiction at the level at which benefits are experienced.

Reflection of Nonjurisdictional Asset in Minnesota Rates

The Department and the Office of the Attorney General contend that NSP not recover the Viking acquisition premium because Minnesota law does not provide a remedy. The Office of the Attorney General and the Department loo to Minn. Stat. § 216B.16, subd. 6 (1992), and argue that compensation or recognition in rates is limited to used and useful property, properly

includable in a Minnesota jurisdictional rate base. Minn. Stat. § 216B.16, subd. 6 (1992), provides:

> Subd. 6. **Factors considered, generally.** The commission, in the exercise of its powers under this chapter to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable service and to the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing

> the service, including adequate provision for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property. In determining the rate base upon which the utility is to be allowed to earn a fair rate of return, the commission shall give due consideration to evidence of the cost of the property when first devoted to public use, to prudent acquisition cost to the public utility less appropriate depreciation on each, to construction work in progress, to offsets in the nature of capital provided by sources other than the investors, and to other expenses of a capital nature. For purposes of determining rate base, the commission shall consider the original cost of utility property included in the base and shall make no allowance for its estimated current replacement value.

The Office of the Attorney General concludes:

> Thus, from a ratemaking perspective, Minn. Stat. § 216B.16, subd. 6 permits the Commission to construct rates using a rate base that may include the prudent acquisition cost of utility property. The Commission has dealt with several requests for acquisition adjustments throughout the years. In each case, the acquisition was a property which qualified to be included in the utilities' rate base. That is not the situation here. (Emphasis in original.)

Initial Brief and Motion for Dismissal of the Office of the Attorney Genera
p. 10. The Department, in its initial brief, makes a similar statement.

Minn. Stat. § 216B.16, subd. 6 (1992), specifically references property that is "used and useful" in determining the rate base on which a utility ma earn a rate of return. The Minnesota courts have historically defined the "used and useful" concept as related to the rate base of the Company, that i the property devoted to the provision of service upon which the utility seek to earn a rate of return. See, Petition of Otter Tail Power Co., 417 N.W.2d 677, 686 (Minn. App. 1988); Application of Peoples Natural Gas Co., 413 N.W 607, 615 (Minn. App. 1987); Senior Citizens Coalition of Northeastern Minnes v. Minnesota Public Utilities Commission, 355 N.W.2d 295, 300 (Minn. 1984); Application of Minneapolis Street Railway Co., 37 N.W.2d 533, 536 (Minn. 194 Northwestern Bell Telephone Co. v. State, 253 N.W.2d 815, 817 (Minn. 1977). Other jurisdictions similarly define the used and useful standard and the concept of a rate base on which a return is to be calculated. Kansas-Nebras Natural Gas Co. v. City of Sidney, 181 N.W.2d 682 (Neb. 1970); Madison Gas and Electric Company v. Public Service Commission of Wisconsin, 313 N.W.2d 8 848 (Wis. App. 1981); Davenport Water Co. v. Iowa State Commerce Commission 190 N.W.2d 583, 588 (Ia. 1971); Iowa-Illinois Gas and Electric Company v. Io

Commerce Commission, 347 N.W.2d 423 (Ia. 1984); Iowa Planners Network v. Iow State Commerce Commission, 375 N.W.2d 106 (Ia. 1985); National-Southwire Aluminum Company v. Big Rivers Electric Corporation, 765 S.W.2d 503 (Ky. App 1990). Under such authority, a utility is entitled to earn a reasonable ret on property that is dedicated within the jurisdiction for the provision of utility service. The allowance of a fair rate of return on rate base is mandated by the Federal Constitution to prohibit confiscatory rates.

For jurisdictional property included in a rate base, the general rule i that an acquisition adjustment may be allowed when the purchase is prudent a results in net, direct benefits to ratepayers. Midwest Gas, 127 PUR 4th 173 (Minn. PUC 1991); Kansas Power and Light Co., 127 PUR 4th 201 (Ka. SCC 1991) Midwest Gas, 133 PUR 4th 380 (Ia. Utilities Bd. 1992). It is clear that the purchase of a nonjurisdictional asset which cannot be added to the utility's jurisdictional rate base cannot be used and useful in providing the utility service within the meaning of Minn. Stat. § 216B.16, subd. 6 (1992). The mo succinct analysis of this statement was provided by the Wisconsin Commission its recent consideration of the Viking acquisition premium. Application of Northern States Power Company (Wisconsin) for Authority to Increase Rates fo Retail Gas Service in Wisconsin, 4220-UR-107, December 23, 1993, pp. 10-13. The Wisconsin Commission recognized that no property was added to the jurisdictional rate base as a result of the acquisition. Since that is the case, there is nothing to which an "adjustment" can be added within the rate base.

On the basis of such reasoning, the Department and the Office of the Attorney General conclude that there is no authority in Minnesota to recogni an acquisition adjustment for nonjurisdictional property. As previously not however, Minn. Stat. § 216B.16, subd. 6 (1992), requires the Commission to determine "just and reasonable rates", to allow the utility to obtain enough revenue "to enable it to meet the cost of furnishing the service" and to the need of the public for "reasonable" service. Northern States Power Company argues that the Commission, in determining a just and reasonable rate, may, effect, amortize the acquisition premium as a cost of providing reasonable utility service to Minnesota ratepayers. NSP believes that expense amortization treatment of the acquisition premium, as distinct from rate bas treatment, is both fair to the Company and within the jurisdiction of the Commission under Minn. Stat. § 216B.16, subd. 6 (1992).

The Administrative Law Judge concludes that Minn. Stat. § 216B.16, subd (1992) is broad enough to authorize the amortization as an unusual expense o reasonable acquisition premium for nonjurisdictional property. In Office of Consumer Advocate v. Utilities Board, 449 N.W.2d 383 (Ia. 1989), the Iowa Supreme Court recognized that the used and useful limitation "has more glitt than substantive application in cases of this kind". 449 N.W.2d at 386. Th court held that the "used and useful" concept has application only in fixing rate base. It has no direct application to the amortization of an expense. Similarly, in North Carolina Utilities Commission v. Thornburg, 385 S.E.2d 4 (N.C. 1989), the North Carolina Supreme Court held that no direct nexus need established between an allowable expense and property used and useful in providing service. All that is required is a finding of reasonableness. Th Administrative Law Judge believes that the amortization of the "expense" sou by NSP to provide direct measurable benefits to Minnesota ratepayers need no

be specifically related to property that is used and useful, jurisdictional property, in providing utility service.

A number of jurisdictions have recognized that the cost of providing a direct, measurable benefit to ratepayers may be recovered apart from rate ba treatment and the used and useful standard. In Washington Power Company, 1(PUR 4th 261, 278 (Idaho PUC 1989), the court awarded the utility $58,000 as reasonable payment for services provided free of charge to the utility by a

nonregulated subsidiary in the procurement of gas supplies for the company's Idaho customers. This payment was made even though there was no obligation the jurisdictional utility to compensate its company affiliate. In Midwest Gas, 127 PUR 4th 173, 178 (Minn. PUC 1991), the Commission considered reimbursing a utility for savings to Minnesota ratepayers when the utility connected in Des Moines, Iowa to a Natural Gas Pipeline Company line and thereby created competition between NGPC and Northern Natural Gas, a Midwest supplier. Midwest claimed that the competition and the related negotiations between Midwest and Northern Natural Gas resulted in direct recurring benefi of $665,000 to Midwest's Minnesota customers. The Commission disallowed the proposed savings not for rate base or jurisdictional reasons, but because th utility did not sufficiently document the amount of savings or causation of benefits. In Midwest Gas, 133 PUR 4th 380, 392 (Iowa Utilities Board 1992), the Iowa Utilities Board allowed a utility to recover the cost of holding company mergers even though the holding companies were not themselves provid utility service. The Board reasoned that the utilities as subsidiaries of t new holding companies would be the beneficiaries of the merger of the holdin companies. Since the utilities would benefit by some cost reductions, the Board concluded that it was appropriate to include the cost as an amortizati amount chargeable to jurisdictional ratepayers. In Office of Consumer Advocate v. Utilities Board, 449 N.W.2d 383 (Ia. 1989), t Iowa Supreme Court also allowed amortization of expenses even though the property involved had never become used and useful.

The conclusion that Minn. Stat. § 216B.16, subd. 6 (1992), gives the Commission discretion to amortize a nonjurisdictional acquisition adjustment which is directly beneficial to Minnesota ratepayers and include a reasonabl portion of that amortization in jurisdictional expenses is precisely the regulatory approach taken by the two state commissions that have considered Viking acquisition premium, Wisconsin and North Dakota. See, Northern State Power Company's Appendix, tab 1.

In the Wisconsin proceeding, the Wisconsin Public Service Commission authorized the amortization of the portion of the Viking acquisition adjustm that benefited Wisconsin ratepayers. The Wisconsin Commission stated:

> The Commission finds that there are substantial system benefits to NSPW resulting from the Viking purchase and in addition there will be economic benefits which result from the purchase. The Commission, therefore, finds it reasonable that $1,833,000 should be added to NSPW's revenue requirement over a period of five years, beginning in 1994. The Viking revenue requirement adjustment can be recovered by ratepayers only to the extent that those costs are less than or equal to the savings that customers will recognize as a result of the Viking acquisition.

Application of Northern States Power Company (Wisconsin) for Authority to Increase Rates for a Retail Gas Service in Wisconsin, 4220-UR-107, December 1993, p. 11.

The Office of the Attorney General casts doubt on the continuing validi of the Wisconsin decision in light of Wisconsin Power and Light Company v. Public Service Commission, 511 N.W.2d 291 (Wis. 1994). In that case, the

Wisconsin Supreme Court held that a penalty assessed to Wisconsin Power and Light Company for poor management exceeded the authority of the Commission a constituted retroactive ratemaking. That decision, however, does not undern the decision of the Commission in the Wisconsin proceeding. It does not prohibit the Wisconsin Commission from recognizing and amortizing costs of providing jurisdictional cost savings through the purchase of nonjurisdictio property. The case only requires that the Commission make such an allowance adjusting the rate of return authorized, rather than through a direct amortization for a past expenditure.

In the North Dakota proceeding involving the Viking purchase, the North Dakota Public Service Commission determined:

> Having considered this matter, we believe NSP's purchase of the Viking Transmission Pipeline will result in reduced gas supply and transportation costs which will more than offset the requested recovery. The savings will flow directly and entirely to NSP's customers in the form of lower retail rates. We find it reasonable for NSP's customers to share in the cost of achieving these savings.

Northern States Power Company, Natural Gas, Rates, PU-400-93-534, March 23, 1994, p. 3. This decision was made by the North Dakota Public Service Commission in the face of a staff position paper, dated February 10, 1994, which parallels largely the positions taken by the Office of the Attorney General and the Department of Public Service in this proceeding.

The Office of the Attorney General and the Department of Public Service limiting recovery to a "used and useful" standard, unreasonably limit the sc of Minn. Stat. § 216B.16, subd. 6 (1992). That doctrine was adopted to prot utilities from the imposition of confiscatory rates. It was not designed to frustrate or prohibit amortization of a prudent, reasonable expense which directly benefits Minnesota ratepayers. To argue to the contrary on the bas of a technical interpretation of the statute is to overlook the obvious: NS should be encouraged to benefit its Minnesota ratepayers to the greatest ext possible. If, in good faith, it makes a substantial expenditure to accompli that result and is successful, allowing Minnesota ratepayers to bear a fair portion of the cost of providing the jurisdictional benefit is entirely reasonable. At bottom, the test of whether an expenditure should be include in an expense computation is one of the prudence and reasonableness of the expenditure. North Carolina Utilities Commission v. Thornburg, 385 S.E.2d 4 (N.C. 1989); In re Hawaiian Electric Co., Inc., 82 PUR 4th 218 (Ha. PUC 1987 Pennsylvania Public Utility Commission v. York, Telephone and Telegraph Co. PUR 3rd 146 (Pa. PUC 1963); In re Wisconsin Electric Power Co., CA-4591, October 18, 1974 (Wisc. PSC).

The position taken by the Department and the attorney General would proivde a serious disincentive for NSP to incur future expenses to benefit Minnesota ratepayers, if even considering the propriety of a recovery is bey the jurisdiction of the Commission. The technical reliance on the used and useful standard by the Department and the OAG was well answered by the Iowa Supreme Court in Office of Consumer Advocate v. Utilities Board, 449 N.W.2d 383, 386-87 (Ia. 1989):

The consumer advocate insists the board misapplied a fundamental rule: the "used or useful" rule, an area of law which the courts have visited with some frequency. We have traced the origin of the rule:

> The "used and useful" standard is derived from United State Supreme Court holdings that a utility is entitled to a reasonable return on the value of property used to render services, but "it is not entitled to have included any property not used or useful for that purpose."

Iowa-Illinois Gas & Elec. v. Iowa State Commerce Comm'n, 347 N.W.2d 423, 428 (Iowa 1984) (citing Denver Union Stock Yard Co. v. United States, 304 U.S. 470, 475, 58 S. Ct. 990, 994, 82 L.Ed. 1469, 1476 (1938)).

The rule is based on the notion that, as economic captives, the consumers should pay only for the generating properties which are actually used or useful in rendering the services to them. Iowa Planners Network v. Iowa State Commerce Comm'n, 373 N.W.2d 106, 109 (Iowa 1985); Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n, 347 N.W.2d at 429. The consumer advocate argues that the matter comes down to selecting who should bear a useful economic risk. Should the risk be borne by the energy consumers or the corporate investors?

During the past decade a number of state courts have been confronted with the same issue. Abandonment was for the same reasons given here and likewise occurred before facilities ever went into operation. It seems that every state facing the problem has been confronted with the argument advanced by the consumer advocate; the used and useful rule seems well nigh universal. The rule appears most often in the form of a statute.

The overwhelming majority of the cases indicate that, although superficially it might seem appropriate, the "used or useful" rule has no proper place in the analysis. The cases flatly reject the notion that we confront a simple rule based on an obvious economic premise (investment risks should be assigned the same investors who would enjoy the advantage of profits). The economic premise goes without saying but does not fit into the analysis. See e.g. People's Org. for Washington Energy Resources v. Washington Util. & Transp. Comm'n, 104 Wash.2d 798, ---, 711 P.2d 319, 332 (1985). The most respected case, probably the one most widely cited, is Attorney General v. Department of Public Utilities, 390 Mass, 208, ---, 455 N.E.2d

414, 424 (1983) (statutory "used or useful" rule does not prohibit agency from allowing recovery of a company's prudent investment in plant reasonably abandoned before completion). See also People's Org., 711 P.2d at 329-30 (used or useful statute applies only to rate base); Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n of Wis, 109 Wis.2d 256, ---, 325 N.W.2d 867, 871 (1982) (reversing disallowance of recovery by agency

> as arbitrary and capricious). Other cases, often cited as minority cases to the contrary, are not at point. See e.g. Barasch v. Pennsylvania Pub. Util. Comm'n, 516 Pa. 142, ----, 532 A.2d 325, 331 (1987) (statute expressly prohibited amortization as well as inclusion in rate base); Pacific Power & Light v. Public Serv. Comm'n of Wyo., 677 P.2d 799, 809 (Wyo. 1984) (rate base case -- disallows only costs incurred without prior approval). There does seem to be a small minority view to the contrary. See Citizens Action Coalition of Indiana, Inc. v. Northern Ind. Pub. Serv. Co., 485 N.E.2d 610, 615 (Ind. 1985).
>
> The lesson of these cases is that the "used or useful" argument has more glitter than substantive application in cases of this kind. We ourselves have indicated the prohibition applies to the fixing of rate bases only. See Office of Consumer Advocate v. Iowa State Commerce Comm'n, 432 N.W.2d 148, 151 (Iowa 1988).
>
> From the consumer advocate's point of view the majority cases effectively negate a clear rule of law which is intended to defend rate-paying consumers. From that perspective the rule is of little or no practical advantage to consumers if a utility is not allowed to recover for unused facilities by way of rate base but can amortize the same amount over ten years. The majority cases nevertheless perceive a crucial difference. These cases suggest that the used or useful rule cannot be applied outside rate base questions without doing violence to the whole scheme of public utility law. See Peoples Org., 711 P.2d at 329 (Since the agency only allowed uitlity "to amortize abandoned plant costs, and did not include those costs within rate base or otherwise enable it to earn a return thereon, the "used or useful" concept is not involved."). Whatever ultimate fallout in terms of net economic impact, the majority cases attest that the used or useful rule impedes agency action only in matters where a rate base is directly involved.
>
> The rule did not prevent the agency from approving the amortization allowed here. The district court was correct in so holding.

As courts recognize, the end result, just and reasonable rates, is more of concern that strict adherence to a used and useful concept. National-Southw Aluminum Co. v. Big River Electric Corp., 785 S.W.2d 503 (Ky. App. 1990). same standard of direct benefit and causal relationship as applies to rate b recovery should apply to an acquisition adjustment for nonjurisdictional property sought to be amortized as an expense. In re City Gas Co., Inc., 12

PUR 4th 319, 330 (Fla. PSC 1991). See also, In re Northern States Power Co
131 PUR 4th 315, 319-20, 322 (Minn. PUC 1992).

The Office of the Attorney General and the Department of Public Service
contend that the benefits analysis suggested by NSP and adopted by the
Wisconsin and North Dakota Commissions is foreclosed in Minnesota as a resu
of Application of Peoples Natural Gas Co., 413 N.W.2d 607 (Minn. App. 1987)
In that case, the court excluded from rate base a contribution in aid of
construction that Peoples made to a pipeline supplier. The court held only

that the contributions could not be included in People's rate base under a "used and useful" theory because the pipeline was not the utility property o Peoples Natural Gas Co. 413 N.W.2d at 615. That case would be controlling NSP were seeking to receive a rate of return on the Viking acquisition premi by including the acquisition premium in rate base. As previously discussed, however, NSP is not seeking to include the acquisition premium in rate base The Company is merely seeking to amortize a portion of the expense, prudentl incurred to benefit Minnesota ratepayers. Therefore, Application of Peoples Natural Gas Co., supra, does not prohibit the Commission from recognizing th NSP, upon proper quantification of benefit and proof of causation, may recov a portion of the nonjurisdictional acquisition premium as an amortized exper

Purchased Gas Adjustment Considerations

NSP in this proceeding argues that it is reasonable to offset the benef currently being received by Minnesota ratepayers as a result of the Viking acquisition through the purchased gas adjustment mechanism by using that sam mechanism to offset the amortizable portion of the acquisition premium paid NSP for Viking. Both the Department and the Office of the Attorney General argue that Minnesota law does not authorize the inclusion of such an expenditure in PGA recovery. The Department and the Office of the Attorney General contend that if the benefit to Minnesota ratepayers can be recognize by the Commission through amortizing a portion of the acquisition premium, t recognition must come in a general rate proceeding.

Minn. Stat. § 216B.16, subd. 7 (1992), provides:

> Notwithstanding any other provision of this chapter, the Commission may permit a public utility to file rate schedules containing provisions for the automatic adjustment of charges for public utility service in direct relation to changes in: (1) federally regulated wholesale rates for energy delivered through interstate facility; (2) direct costs for natural gas delivered; or (3) costs for fuel used in generation of electricity or the manufacture of gas.

NSP argues that the acquisition premium paid for Viking is a change in direct cost of natural gas delivered, within the meaning of Minn. Stat. § 216B.16, subd. 7 (1992). It makes this argument largely by stating that t benefit to Minnesota ratepayers from lower cost transmission charges for gas supplies was a direct result of the Viking acquisition, which also makes the acquisition premium a portion of the "direct cost of natural gas delivered" NSP also argues that the Legislature intended to allow the inclusion of indirect, non-gas costs in PGA recovery. The Administrative Law Judge concludes from a review of the historical purpose of the PGA mechanism, jurisdictions that have considered the limited nature of the PGA device and

direct Minnesota authority that it is inappropriate to include any amortizat
of the Viking acquisition adjustment in PGA recovery.

PGA clauses were instituted in the mid-1970s and were designed to allow for automatic adjustments in extremely limited circumstances where energy charges for electric and gas utilities were subject to rapid fluctuation. In re Kansas Power and Light Co., 127 PUR 4th 201, 238 (Ka. Com. 1991); Rate Making Policies for Natural Gas Purchasers, 105 PUR 4th 365, 371 (Ore. PUC

1989); Public Service Company of New Hampshire v. State, 311 A.2d 513, 517 (N.H. 1973); Railroad Commission of Texas v. High Plains Natural Gas Company 613 S.W.2d 46, 48 (Tex. Civ. App. 1981); In re Montana-Dakota Utilities Company, 130 PUR 4th 76, 84 (Wyo. PSC 1992). The common feature of the PGA mechanism throughout the states is that it is not to substitute for a genera ratemaking proceeding; it is a deviation or accommodation based on necessity be narrowly construed. Indiana Gas v. Utility Consumers Counselor, 575 N.E 1044, 1050 (Ind. App. 3d Dist. 1991); In re Mountain States Telephone and Telegraph Co., 78 PUR 4th 287, 291 (Colo. PUC 1986); Pike County Light and Power Company, 78 PUR 4th 425, 428 (Penn. PUC 1986).

The justification for a PGA mechanism and the circumstances under which applies have been appropriately limited to the large volatile costs of gas a fuel used by electric and gas companies to provide the utility service, whic cost changes are beyond the ability of the utility to control. In re Mounta States Telephone and Telegraph Co., supra; Montana Consumer Counsel v. Monta Public Service Commission, 541 P.2d 770 (Mont. 1975); Consumer Organization Fair Energy Equality v. Massachusetts Department of Public Utilities, 368 Ma 599, 335 N.E.2d 341 (1975). The circumstances in which a purchased gas adjustment ought to be used, therefore, are limited, not expansive as conte by Northern States Power Company.

In the North Dakota Viking proceeding, NSP had initially sought to incl the acquisition adjustment in the PGA mechanism. The North Dakota Commissio specifically decided that inclusion of the acquisition in PGA recovery was inappropriate. Northern States Power Company, Natural Gas, Rates, PUC-400-534, March 23, 1994, p. 4.

Similarly, in Application of Interstate Power Co., 500 N.W.2d 501 (Minn App. 1993), the utility sought to include in the fuel adjustment clause the demand charge cost of 100 megawats of excess capacity. The Commission rejec that use of the fuel adjustment clause. The Commission stated:

> The purpose of the fuel clause is to recover actual fuel costs. Through this clause [Interstate] recovers exactly what [the fuel] costs.

500 N.W.2d at 506. The PUC further found that the use of the mechanism was limited to actual fuel costs and should not be expanded to nonfuel concerns 500 N.W.2d at 506. In affirming the decision of the PUC, the Court of Appea stated:

> We conclude the MPUC correctly refused to apply the fuel adjustment clause in either manner requested by Interstate. The fuel adjustment clause is designed to automatically adjust for actual fuel costs, and should not be used in a manner inconsistent with this purpose.

500 N.W.2d at 506.

The Administrative Law Judge also relies on the internal evidence in th Commission's rules and rulings by the Commission cited by the Department of Public Service to conclude that it would be inappropriate to apply a PGA mechanism to the Viking acquisition premium. Department of Public Service's Motion for Summary Judgment, pp. 8-9.

In its filing, NSP requests an opportunity to pursue a variance to the PGA rules. Those rules, however, are limited by Minn. Stat. § 216B.16, subd. 7 (1992), and the narrow purpose of the PGA mechanism, as previously discussed NSP has not offered any argument as to why it would be inappropriate to consider the benefit to Minnesota ratepayers from the Viking acquisition in general rate proceeding. Nor, has NSP provided any authority for immediate recovery in a miscellaneous docket. The Attorney General correctly states:

> NSP has provided no authority for the proposition that the amortization premium may be recovered through a miscellaneous docket. Indeed, all of the cases cited by NSP which authorize immediate rate recovery of the acquisition adjustment occur in the rate case context. See e.g. Midwest Gas, supra; Consumer Advocate v. Iowa Utilities Board, 454 N.W.2d 883 (Iowa 1990). The two non-rate cases cited, In re Kansas Power and Light Co., 127 PUR 4th 201 (1991) and In re Indiana Gas Co., Inc., 89 PUR 4th 416 (1988) were merger approval cases in which future recovery in rate cases was in some fashion permitted, apparently, when a rate case is filed. E.g., In re Indiana Gas Co., Inc., 89 PUR 4th at p. 429, para. 6. Thus, NSP has offered no procedural authority for rate recovery of the acquisition adjustment by means of a miscellaneous filing. Since a rate case is the only procedurally correct method for the rate recognition of an acquisition adjustment, NSP's Application should be dismissed.

Initial Brief and Motion for Dismissal of the Office of the Attorney Genera p. 18.

As indicated by the North Dakota Commission, it may be that the current rates of NSP are sufficient to allow amortization, if proven appropriate, without changing retail rates. Northern States Power Company Natural Gas Rates, PU-400-93-534, March 23, 1994, p. 4. Similarly, in the Wisconsin proceeding, the Wisconsin Public Service Commission considered the request o Northern States Power Company within the context of a general rate proceedin As previously discussed, the public utilities commissions of various states the courts have recognized that a purchased gas adjustment is an aberration be applied in limited circumstances and not a substitute for a general ratemaking proceeding. In re Mountain States Telephone and Telegraph Co., supra; In re Indiana Gas Company, Inc., 112 PUR 4th 493, 507 (Ind. URC 1990) Indiana Gas v. Utility Consumer Counselor, 575 N.E.2d 1044, 1050 (Ind. App. Dist. 1991). The Administrative Law Judge believes that recovery of any portion of the acquisition premium is inappropriate outside of a general ratemaking proceeding. The Company has not demonstrated an exigent circumstances that would make recovery in a general rate proceeding inappropriate or unfair to NSP.

The Administrative Law Judge, therefore, recommends to the Commission t it issue an Order dismissing the Petition of NSP in this proceeding, since t PGA remedy is not available. NSP should be allowed to raise the issue of an acquisition premium for the Viking purchase in its next general gas rate proceeding, where the existence and amount of direct benefits as well as causality can be determined.

B.D.C.